UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

COMMERCIAL CARGO SERVICES, INC.

[1]

Employer

and **Case 12-RC-9112**

TEAMSTERS LOCAL UNION NO. 991, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Commercial Cargo Services, Inc., provides parcel pickup and delivery services, pursuant to a contract with DHL, with a facility located in Tallahassee, Florida. On March 18, 2005, the Petitioner, Teamsters Local Union No. 991, affiliated with International Brotherhood of Teamsters, AFL-CIO, filed a petition seeking to represent all full-time and regular part-time drivers and warehousemen employed by the Employer at its Tallahassee facility.

The issues presented for resolution are whether the drivers are independent contractors; and whether "supervisors" Tony Amos and Ron Rodriguez should be included in the unit. The Employer primarily argues that the drivers are independent contractors because they control the manner and means of the performance of their delivery routes; they are responsible for all expenses associated with their delivery routes; they are free to perform delivery services elsewhere; and they do not receive fringe benefits or have taxes withheld from their compensation. The Petitioner primarily argues that the drivers are employees because they lack substantial control over the manner and means of the performance of their delivery routes due to the standards imposed upon them by the Employer's contract with DHL, which also constrains

the drivers from performing delivery services elsewhere; they do not own or directly lease their vans; and the Employer controls all major expenses associated with their delivery routes.

The Petitioner contends that Amos and Rodriguez are supervisors within the meaning of Section 2(11) of the Act and they should be excluded from the unit because they use independent judgment to assign and responsibly direct the drivers, and they recommend discipline for the drivers. The Employer contends that Amos and Rodriguez are employees and they should be included in the unit because they do not possess supervisory authority.

I have considered the evidence and the arguments presented by the parties, and the timely brief filed by the Petitioner.[2] Based on the evidence and relevant law, I conclude that the drivers are employees within the meaning of Section 2(3) of the Act. Further, I conclude that there is insufficient evidence to make a finding as to whether Tony Amos and Ron Rodriguez should be included in the unit, and I shall permit them to vote subject to challenge in the directed election herein. I have directed an election in a unit consisting of all full-time and regular part-time drivers and warehouse employees employed by the Employer at its Tallahassee facility, excluding all office clerical employees, guards and supervisors as defined in the Act.[3] There are approximately 20 to 24 drivers and 4 to 8 warehouse employees in the unit found to be appropriate.

In the discussion below, I will provide a brief history of the Employer's operations and a brief description of the Employer's supervisory structure. I will describe in detail the operational aspects of the Employer's parcel pickup and delivery services which involve the services of the drivers. I then will analyze the facts and provide the reasoning in support of my conclusions.

RELEVANT BACKGROUND OF THE EMPLOYER'S OPERATIONS

The Employer is owned by Brent Ford, whose office is located in Georgia.[4] DHL has a contract with the State of Florida to provide parcel pickup and delivery services. DHL then

contracts with the Employer to provide those pickup and delivery services. There is no evidence that the Employer contracts with any other entity to provide parcel pickup and delivery services at its Tallahassee facility.

Until recently, the Employer employed drivers and warehouse employees to meet its contractual obligations to DHL. The Employer's warehouse employees worked from around 6:00 a.m. to 9:00 a.m., and from around 6:00 p.m. to 9:00 p.m. In the morning, they unloaded freight from containers delivered by DHL to the Tallahassee airport. Each driver had an assigned route, based on a geographical area, for the pickup and delivery of freight to DHL customers. The driver reported to the warehouse around 6:30 a.m., packed his truck, and proceeded to make the deliveries on his route. During the day, the driver also picked up freight from DHL customers on his route. The driver had to make his deliveries by no later than 5:00 p.m., and he had to return his pickups to the warehouse by no later than 8:00 p.m. In the evening, the warehouse employees packed the freight picked up by the drivers into containers for transport to the Tallahassee airport.

At some fixed point in time,[5] the Employer decided that it no longer wanted to employ drivers to provide its delivery and pickup services for the DHL freight. Instead, the Employer decided to offer each of its drivers the opportunity to enter into an "Independent Contractor Agreement" (ICA) with the Employer to provide the same delivery and pickup services on his same route.[6] All drivers agreed to sign the ICA and they continued to drive their same routes. The Employer contends that, as of the date that the drivers signed the ICA, they lost their status as employees and they became independent contractors. The Employer continued to employ its warehouse employees with no changes in their duties or status. There is no evidence that there were any changes in the Employer's contract with DHL at the time the drivers signed the ICA.

SUPERVISORY STRUCTURE

The Employer has facilities in Tallahassee and Jacksonville, Florida. This petition involves the

Tallahassee facility only. Each facility has a station manager. The sole witness at the hearing was Juan Rivera. At the time of the hearing, Rivera, the station manager in Jacksonville, had just been promoted to regional manager and he was in the processing of training his successor in Jacksonville. As regional manager, Rivera will oversee the operations of both facilities. He visits the Tallahassee facility once a week.

The station manager in Tallahassee is identified only as "Kelvin". The parties stipulated that Kelvin is a supervisor within the meaning of Section 2(11) of the Act, and he should be excluded from the unit. Rivera testified that Kelvin has two assistants, Tony Amos and Ron Rodriguez, each of whose title is "supervisor". As will be discussed in detail below, I have found that the evidence is inconclusive as to whether they are supervisors within the meaning of Section 2 (11) the Act. There is a lead driver/trainer identified only as "J.D.", whom the parties stipulated should be included in the unit.

Kelvin oversees the operations of the warehouse and the freight delivery and pickup services at the Tallahassee facility. According to Rivera, Amos and Rodriguez work full-time and are responsible for insuring "everything is being done correctly at the station;" [7] one covers the morning operations, and the other covers the afternoon operations. They drive an average of one day a week making deliveries and pickups. [8] They also substitute for Kelvin. [9]

DUTIES OF WAREHOUSE EMPLOYEES AND DRIVERS

The Employer operates six days a week, Monday through Saturday, from 6:00 a.m. to 9:00 p.m. There are approximately 4 to 8 warehouse employees [10] and 20 to 24 drivers at the Tallahassee facility. As noted, the warehouse employees report for work around 6:00 a.m. Each day, one of the warehouse employees picks up DHL freight in containers at the Tallahassee airport and delivers the containers to the warehouse. The warehouse employees then unload the freight from the containers. They complete the unloading around 9:00 a.m. If

they are done early, they can leave work.

[11]

The drivers have a “set” starting time of 6:30 a.m., and they are required to work six days a week, Monday through Saturday. The drivers pull the freight based on the geographical area assigned to their routes and pack their trucks. Although DHL requires that certain packages be delivered by 12 noon or by 3:00 p.m., all deliveries must be made by 5:00 p.m. Throughout the day, the drivers also pick up freight from the DHL customers, who may call for such pickups until 6:00 p.m. Pickups are then delivered by the drivers to the warehouse between 6:00 p.m. and 8:00 p.m.

The warehouse employees report back to work around 6:00 p.m., pack the parcel pickups into containers for delivery to the Tallahassee airport, and leave work around 9:00 p.m.

J.D., the lead driver/trainer, works full-time and is responsible for assisting the drivers throughout the day. J.D. notifies the drivers of daily pickups that they need to make on their routes. He spends about half his time delivering overflow freight which cannot be handled by the drivers, assisting drivers who do not have sufficient time to deliver all their freight on time, and replacing absent drivers. He is responsible for training new drivers not previously employed by the

[12] [13]

Employer. J.D. spends the remainder of his time doing paperwork.

HIRE AND TRAINING OF DRIVERS

As noted, when the Employer decided that it no longer wished to employ its own drivers to deliver and pick up DHL freight, it decided to offer each of its drivers the opportunity to enter into an “Independent Contractor Agreement” (ICA) to continue to deliver and pick up DHL freight on his same route. There is no evidence that any driver was offered a route other than his own route. Rivera testified that since each driver was already familiar with his route, the Employer decided that it would be better for the driver and the customers if the driver continued to drive his same route. All drivers accepted the Employer’s offer and signed the ICA; these drivers had been employed by the Employer for an average of about two years.

In these circumstances, there was obviously no need to train any of these drivers previously

employed by the Employer to perform their routes because they already had been driving these same routes. However, Rivera testified that if DHL should make any changes in its delivery standards, the Employer will train these drivers regarding any new DHL standards.

With respect to new drivers, who previously have not been employed by the Employer, they are trained in a specific delivery sequence for their specific route that the Employer thinks is best to achieve timely deliveries. They are trained by J.D., Amos or Rodriguez, who ride with the driver on his route until they feel he is proficient in his delivery and pickup services. According to Rivera, after the driver is familiar with the route, he can decide on his own delivery sequence. However, if the driver fails to make his deliveries on time, the Employer will "advise" or "suggest" to the driver that he return to the original delivery sequence.

The ICA requires drivers to pass a background check and drug test, which are paid for by the driver.

CONTROL OVER MANNER AND MEANS OF WORK

The ICA contains several provisions which identify the driver as an independent contractor, and it states that the driver will not be deemed or construed to be an employee of the Employer. The ICA provides that the driver is responsible for the "manner and means of securing the end result" of his delivery services, that the Employer shall exercise "no direct control" over the driver, that the driver is free to set his own work schedule, reject any "routed delivery and pickup orders," and provide services to other courier companies.

As noted above, there is no evidence that there was any change in the Employer's contract with DHL at the time the drivers signed the ICA. The ICA requires the drivers to comply with DHL's "services guides" and "cargo contract specifications".[14]

Although Rivera testified that the drivers are free to arrange their own routes, the Employer provides the drivers with a "guide" that they are expected to follow in the performance of their routes.[15] According to Rivera, as long as "everything's followed" in the guide, and all

packages are delivered on time, the driver is free to do his route how he wants to do it.

The record shows that DHL requires that certain deliveries be made by noon, or by 3:00 p.m.; all other deliveries must be made by 5:00 p.m. The ICA also requires that the drivers make "on demand" pickup and deliveries as required by DHL or the Employer. DHL customers have until 6:00 p.m. to request a pickup; and the driver must return all pickups to the warehouse by 8:00 p. m. for transport to the airport.

Although a driver services the same exact geographical route each day, the number of packages can fluctuate from day to day. According to Rivera, Amos and Rodriguez have the right to unilaterally decide that a driver has too many packages that day for him to make his deliveries on time. Based on their individual judgment, they have the right to adjust the driver's route and give his packages to another driver for delivery or to use one of the Employer's other employees to deliver these packages. Rivera testified that the Employer will do "whatever it has to do" in order to insure that all deliveries are made on time. Thus, Amos and Rodriguez possess the authority, in the interest of the Employer, to exercise their individual judgment to assign and responsibly direct the drivers by adjusting a driver's load and by assigning his freight to another driver, or to one of the Employer's other employees. [16] When Amos or Rodriguez makes the decision to adjust a driver's load and to divert his freight to another driver, or to one of the Employer's other employees, this decision has a direct and immediate impact on the compensation paid to the drivers so affected. [17]

Rivera testified that, even if the driver objects to the loss of these deliveries, the Employer has the right to "override" the driver and make the determination as to whether he can make a delivery on time. The Employer will consider the option of allowing the driver to leave packages at the warehouse which do not require delivery that day, if they can be timely delivered the following day, so he will not lose money on these deliveries.

Although Rivera testified that the driver is free to "turn down a job", it is unclear if he means that

the driver can pick and choose the packages which he will deliver or pick up each day, even where the packages have already been assigned to his route; or if he means that the driver can choose not to report to work on a given day. If Rivera means that a driver has the freewheeling discretion to pick and choose every package that he is willing to deliver and pick up on his route every day, it seems reasonable to conclude that this would result in chaos which would make timely deliveries and pickups very difficult. This also appears inconsistent with the ICA's requirement that drivers make pickups and deliveries on demand. There is no evidence that anyone, in fact, has ever turned down individual pickups or deliveries.

REPLACEMENT DRIVERS

Rivera testified that the driver is responsible for providing a trained driver to perform his route in his absence, but the replacement driver must be deemed "qualified" by the Employer before he can do the route. The Employer requires that such a replacement pass a background check and drug test, which are paid for by the driver. The Employer also requires that the replacement be

[18]

put on the driver's commercial vehicle insurance policy, which is controlled by the Employer. Despite the above testimony, Rivera further testified that no driver, in fact, has ever provided a replacement in his absence, even for a week's vacation; rather, the Employer uses one of its other employees to do the route. Drivers are required to drive 6 days a week and, if a driver cannot perform his route on Saturday, he is charged a flat rate of $75.00 for the replacement. If a driver's truck breaks down during his route, the Employer will send one of its employees to finish the route. If a driver realizes during his route that he will be unable to finish all his deliveries on time, the Employer will send one of its employees to help him make his deliveries. There is no evidence that any driver has ever incurred any monetary penalties for his failure to

[19]

perform his route.

DISCIPLINE AND TERMINATION

Rivera testified that Amos and Rodriguez can recommend that drivers be disciplined and

suspended. Although Rivera testified that he trusts his supervisors to make decisions to discipline drivers without the need for an independent investigation, he first testified that he did not know if Kelvin makes an independent investigation but he later testified that Kelvin did so. The ICA provides that it can be terminated without cause at any time by either party upon 10 days' written notice; otherwise, the ICA continues without any time limitation. There are no penalties for termination of the contract.

Rivera testified that if a driver fails to report to deliver his route, he will be put on 10 days' notice that if he does not get himself "on track", he will "lose his job". Rivera also testified that if a driver fails to make his deliveries on time, and it is determined that it was not his fault, then the Employer will not discipline the driver. However, if it is determined that the driver is at fault, the Employer will put the driver on 10 days' notice to "get it straight". Rivera testified that if a driver continues to fail to make his deliveries on time, the Employer will "suggest" that he return to the specific delivery sequence taught to him during his training. If the driver fails to follow the Employer's suggestion, he will be put on 10 days' notice.

There is no evidence that any driver's contract has been terminated. Thus, based on Rivera's testimony, the Employer appears to use the 10 days' notice more as a warning than as the Employer's invocation of its right to terminate the contract upon 10 days' notice.

ROUTES AND COMPENSATION

As noted, the drivers did not have the right to choose their routes; the Employer offered them the same routes that they had driven before signing the ICA. The ICA provides that the drivers receive a "base rate per airbill" of $1.63 and a "base airbill level per week" of 489; and if the

[20]

airbills exceed the base airbill level, the driver receives the "threshold rate per airbill" of $.15. If there is a holiday when DHL does not operate, the contract provides that the driver's base airbill level will be lowered proportionately for that week. There is no evidence that the drivers have had any right to negotiate either the base airbill rate or the base airbill level, or that the drivers have had any input regarding any form of compensation. There is no evidence that the

drivers have any input regarding the rates of compensation paid by DHL to the Employer. There is no evidence that there are differences in compensation among the drivers. There is no record

[21]

evidence which compares the drivers' earnings before and after they signed the contract. The drivers receive no other benefits from the Employer.

There is no evidence that the drivers have the right to sell their routes, or to negotiate with the Employer to acquire more than one route, or to even expand the geographical area of their route. No driver has more than one route. However, in contrast, the Employer can unilaterally adjust the number of deliveries that the driver can make in any given day based solely on its judgment that the driver will be unable to make all his deliveries on time that day. This is true even in the face of the driver's objection. The Employer is free to take deliveries away from the driver and give them to another driver or give them to one of its other employees to deliver. There is no record evidence that establishes that the drivers have a proprietary interest in their route or that they have any significant opportunity for entrepreneurial gain or loss.

Drivers are paid bi-weekly by check from the National Independent Contractors Association (NICA). They receive their checks at the warehouse. The drivers are responsible for all federal, state and local taxes; however, they can arrange for NICA to make these deductions from their checks for a fee. The Employer does not provide for worker's compensation benefits or unemployment compensation benefits. As will be discussed below, the ICA requires that deductions be made from their checks for most major expenses related to their vehicles and other equipment.

The warehouse employees, as well as the Employer's other employees, apart from the drivers, are paid a salary; however, there is no evidence regarding the level of their compensation. They receive paid holidays, sick days, and vacation. The Employer deducts federal, state and local taxes from their wages, and it provides them with worker's compensation benefits and unemployment compensation benefits.

DRIVER EQUIPMENT AND EXPENSES

Scanners

DHL leases scanners to the Employer which are used to track all deliveries and pickups made by the drivers. The Employer uses the scanners to communicate with the drivers while they are doing their routes. Before the drivers signed the ICA, they were not charged for the use of the scanners. The ICA requires that the drivers have $28.00 deducted from their biweekly checks to "lease" the scanners from the Employer.

Uniforms

All drivers are required to wear DHL uniforms and DHL identification badges.[22] DHL provides them to the drivers free of charge. J.D., Amos and Rodriguez wear the same uniforms when they do deliveries and pickups for the Employer.

Vans

All drivers drive yellow vans with the DHL name on them. The Employer's name also appears on the doors of the van; the driver's name does not appear anywhere on the van.[23] There is no evidence that any driver has established an incorporated business which covers his delivery services for the Employer.

All vans have been leased by the Employer, and all vans are registered in the name of the Employer. The drivers pay a "leasing fee" to the Employer for the vans which is deducted from their biweekly checks. The record does not show if this is the same leasing fee paid by the Employer or if there is any additional charge. The drivers also pay for the van's vehicle registration and license fees. There is no evidence that the drivers who had been previously employed by the Employer had a choice regarding their vans; none of these drivers bought his own van to do his route. The drivers have the right to take their vans home at night, although there is no evidence as to how many drivers do so. The Employer also has its own additional yellow vans with the DHL name on them which are used by J.D., Amos and Rodriguez to drive when they make deliveries and pickups for the drivers or for other reasons.

Although Rivera testified that the Employer has a "lease to own" arrangement with the drivers regarding their vans, there is no evidence as to its effect on the driver if his contract is terminated, that is, whether a driver incurs any penalties related to the end of the lease or whether a driver has a right to continue to lease the van until he owns it. Rivera testified that if at the time of the termination of his contract, the driver then owns his van, DHL will pay to have the van repainted so as to remove the DHL name, color, and logo.

Other Expenses

The ICA provides that the Employer will obtain commercial vehicle insurance for the driver's van, and its cost is deducted from the driver's biweekly check; the driver has no choice in this matter. The Employer also provides cargo insurance through DHL, and its cost is deducted from the driver's biweekly check; the driver also has no choice in this matter.

The drivers are responsible for gas, maintenance and repair expenses for their vans.[24] Rivera testified that the Employer can decide whether a driver's van meets DHL's "strict safety standards", and the Employer has the right to prevent the driver from doing his route until it decides that his van complies with those standards.

With respect to rising gas prices, Rivera testified that the Employer could seek additional compensation from DHL but the Employer would control whether to share it with the drivers.

RIGHT TO ENGAGE IN OTHER COMMERCIAL ACTIVITIES

With respect to the driver's right to use his van for other commercial activities, the ICA provides that drivers are free to do so.[25] However, Rivera testified that he did not think that the drivers had the right to do so, and he did not know of any driver who used his van for any other reason other than to perform his own route. Rivera even testified that if he found out that a driver was using his van to make deliveries other than DHL deliveries while doing his route, he would contact the Employer's owner and DHL to so inform them. However, when the Employer's attorney read to Rivera the ICA provision that ostensibly gives drivers the right to provide

[26]

services to other courier companies, Rivera then agreed that the driver could do so.

ANALYSIS AND CONCLUSIONS

The Employee Status of the Drivers

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor". In determining whether individuals are independent contractors, the Board applies the common-law agency

[27]

test. Under this test, the Board assesses and weighs all incidents of the relationship between the individual and the employing entity, with no single factor being decisive. The

[28]

burden of proof is on the party asserting the independent contractor status.

I conclude that the Employer has failed to meet its burden of proof to establish that the drivers are independent contractors and I find that they are employees within the meaning of Section 2(3) of the Act. Although I recognize that there are some factors that could support a finding of independent contractor status, the vast majority of the factors compel a finding of employee status.

At its Tallahassee site, the Employer's sole business operations consist of parcel pickup and delivery services for DHL. The drivers provide these pickup and delivery services, Monday through Saturday, and they are an essential part of the Employer's operations. The Employer has extensive control over the details of the work performed by the drivers by requiring the drivers to comply with DHL's services guides and cargo contract specifications; DHL has strict pre-set times for deliveries and pickups, as well as on-demand deliveries and pickups. The Employer monitors and enforces DHL's strict safety standards for the drivers' vans.
The Employer had trained the drivers in DHL's strict delivery standards before they signed the ICA , and it will train the drivers if DHL should make changes in these standards. New drivers are trained in the specific delivery sequences deemed most efficient by the Employer. The

drivers do not need any additional skills.

The Employer monitors the driver's performance and effectively uses the ICA's "ten days' notice" as a kind of disciplinary warning to put the driver on notice that he must improve his performance or risk termination of his contract. Although the Employer can terminate the driver's contract without cause, and without penalty, there is no evidence that the Employer has ever used the "ten days' notice" to terminate a driver's contract.

Pursuant to the ICA formula, the driver is compensated based on the airbill rate, the base airbill level per week, and the threshold airbill rate. Because DHL has strict delivery standards, the Employer has the unilateral right to adjust a driver's delivery load and take packages from one driver and give them to another driver, or to one of its other employees, based on its judgment that the driver will not have sufficient time to complete all his deliveries on time. Thus, the Employer's operations appear to result in minimum guarantees and effective ceilings for the driver's compensation.

There is no evidence that the driver can in fact negotiate with the Employer to obtain an additional route, or to expand his route, or to sell his route. Thus, the driver has no true proprietary interest in his route. None of the drivers has incorporated a business to cover his pickup and delivery services for the Employer.

With respect to his risk of entrepreneurial loss, there is no evidence that a driver has been penalized for a failure to perform his daily route. The evidence shows that the Employer will provide a replacement for the driver in his absence, and the Employer will make deliveries and pickups for the driver if he is unable to complete his route due to a van breakdown or due to a lack of time to complete his deliveries.

The Employer leases the driver's van. Although the van is registered in the Employer's name, the Employer requires the driver to pay for its registration and license fees. All vans are yellow and display the DHL name. The Employer's name is on the doors; the driver's name does not appear on the van. There is no evidence that the drivers had any choice in the selection of the

vans.

The driver pays a “leasing fee” to the Employer for the use of the van, which may or may not be the same fee paid by the Employer to lease the van. Although there is testimony that the drivers have a “lease to own” arrangement with the Employer, there is no evidence of any penalty incurred by the driver related to this leasing arrangement if he or the Employer chooses to terminate his contract. There is also no evidence that the driver has the right to continue to “lease” the van until he owns it if he or the Employer chooses to terminate his contract.

In addition, the driver has no choice with respect to his commercial vehicle insurance; and the ICA requires that its cost be deducted from the driver’s biweekly compensation. The same is true for cargo insurance which the Employer obtains through DHL. The Employer leases scanners from DHL, and the driver pays the cost. Thus, the driver has no control over any of the major expenses associated with his delivery route. In effect, the ICA has permitted the Employer to shift most of its former major capital costs to the driver.

I conclude that the major factors relied upon by the Board in finding the drivers to be employees in Roadway Package System are strikingly similar to the factors present in this case. Like the Roadway Package System drivers, these drivers are an essential part of the Employer’s normal operations; they receive training from the Employer; they do not do business in their own name or corporate name; they do not engage in outside commercial activities; they are under substantial control of the Employer due to its requirements to meet DHL’s strict delivery standards; they have no true proprietary interest in their routes; and they have no significant

[29]

entrepreneurial opportunity for gain or loss.

The majority of factors relied upon by the Board in finding the drivers to be independent contractors in Dial-A-Mattress are not present here. Unlike the drivers in Dial-A-Mattress, these drivers perform an essential part of the Employer’s operations; they do not incorporate businesses; they do not hire their own employees and helpers; they do not arrange their own training; they do not finance their own vehicles; the Employer leases their vans; the Employer

controls most major expenses related to their routes; and the Employer has the right to adjust their delivery loads which may have a direct and immediate impact on their compensation, as [30] Rivera testified.

Contrary to the Employer's assertions in its brief that the majority of factors relied upon by the Board in finding the drivers to be employees in Corporate Express Delivery Systems [31] are not present here, the record clearly demonstrates that the factors are overwhelmingly similar here. Like the drivers in Corporate Express, these drivers perform essential functions of the Employer's normal operations; they work full-time and they are trained by the Employer; they do not do business in their own names or corporate names; the Employer provides substantial guidance and control over their delivery services due to its requirements to comply with DHL's strict delivery standards; they must purchase their commercial vehicle insurance through the Employer; they are required to drive vans displaying the DHL logo and to wear DHL's uniforms; they cannot sell their routes; their base rate is determined by the Employer; the Employer can adjust the amount of freight that they can deliver in any given day; the Employer incurs no liability for terminating the driver's contract; the Employer provides replacement drivers; and the Employer requires background checks and drug tests. Moreover, unlike the Corporate Express drivers, these drivers do not own their own vehicles or provide their own financing for them.

In its argument, the Employer emphasizes that the Corporate Express drivers did not have the right to accept or reject customers whereas its drivers do have that right. Although there was testimony that drives can "turn down" jobs, there was no explanation of what was meant. It does not appear that the driver's supposed right to "turn down a job" could be deemed to be his right to pick and choose the packages which he will deliver or pick up on any given day, particularly in light of the Employer's obligation to comply with DHL's strict delivery standards. Moreover, the ICA requires the drivers to perform "on demand" pickups and deliveries. In addition, there is no evidence that any driver has ever rejected a pickup or delivery; and it is clear that the Employer

can unilaterally decide to take deliveries away from the driver if it determines that he cannot deliver them on time, even over his objection.

Although it is recognized that on its face the ICA gives the drivers the right to provide services to other delivery services, and the Corporate Express drivers did not have that right, there is no evidence that any driver has ever done so. Since the Employer requires the drivers to work six days a week and to comply with DHL's strict delivery standards, which include on-demand pickups and deliveries, it is hard to imagine when the Employer's drivers would have the time to do so.

[32]

The significant factors relied upon by the Board in finding the drivers in Argix Direct, Inc., to be independent contractors are not present here. Unlike the Argix drivers, the drivers do not have incorporated businesses; they do not hire multiple drivers to perform multiple routes; the Employer leases their vans, and they have no control over the major expenses associated with their vans and equipment; they cannot maximize their income; they are obligated to work six days a week; and none of the drivers, in fact, performs work for other delivery services. Like the Argix drivers, the Employer's drivers, in theory, have the right to provide services for other delivery services; however, unlike the Argix drivers, there is no evidence that any driver has done so. Moreover, several factors cited in Argix which the Board acknowledges could support a finding of employee status are present here. The drivers have a working relationship with the Employer that continues as long as performance is satisfactory; the drivers are required to wear

[33]

uniforms and badges; and the ICA was unilaterally promulgated by the Employer.

It is recognized that the ICA contains several provisions which identify the driver as an independent contractor and which express an intention by the parties to create an independent contractor relationship, including a provision that the driver is responsible for the "manner and means of securing the end result" of his delivery services. However, the Board has

[34]

acknowledged that contract language is not necessarily dispositive. As I have discussed in detail above, when all the incidents of the relationship between the individual driver and the Employer are assessed, weighed, and examined as a whole, they clearly belie the language of the ICA. As in Roadway Express and Corporate Express, such factors as the existence of an "independent contractor" agreement, the driver's responsibility to pay all federal, state and local taxes, the lack of fringe benefits, and the driver's "right" to engage in other commercial activities simply do not outweigh the numerous substantial factors that support the finding of employee status here. I conclude that while the Employer made certain changes to its financial benefit when it attempted to convert its drivers to independent contractors, it did not otherwise change the fundamental nature of its relationship with its drivers.

Accordingly, based on the record evidence and the applicable case law, I conclude that the drivers are not independent contractors, and they are employees within the meaning of Section 2 (3) of the Act.

The Status of Tony Amos and Ron Rodriguez

As noted above, I find that there is insufficient evidence to make a finding as to whether Tony Amos and Ron Rodriguez should be included in the unit, and I shall permit them to vote subject to challenge in the directed election herein.

Section 2(11) of the Act defines a supervisor as:

> Any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

An individual need only possess one of the indicia of supervisory authority in order to meet the requirements of Section 2(11) of the Act.[35] Section 2(11) does not require that the individual routinely or regularly exercises this supervisory authority; it is the mere existence of the authority to exercise this power which determines whether the individual is a supervisor.[36] The burden

of proving supervisory status is on the party asserting such status.[37] Lack of evidence of supervisory authority is construed against the party asserting that the authority does exist.[38] Although an individual may have the title of “supervisor”, this is insufficient to confer supervisory status on that individual.[39]

The record shows that it is the responsibility of Amos and Rodriguez to insure that “everything is being done correctly at the station”; each has the title of “supervisor”. However, Rivera provided few details as to how they accomplish these responsibilities. One covers the morning operations, and the other covers the evening operations. They drive an average of one day a week making deliveries and pickups. They also train new drivers. They also substitute for Kelvin, which would appear to be on a regular basis. However, Rivera provided no details as to the extent of their responsibilities or how their authority changes when they substitute for Kelvin. The record shows that they have the authority to adjust a driver’s route and give his packages to another driver for delivery, or to use one of the Employer’s other employees to deliver his packages. However, due to the lack of detailed evidence regarding the ICA formula for the driver’s compensation, it is unclear as to the full impact of this on a driver’s weekly compensation. Rivera provided confused and contradictory testimony regarding the authority of Amos and Rodriguez to independently discipline the drivers. Although he first testified that they had such authority, he later testified that Kelvin would make an independent investigation regarding their recommendations. There is no evidence as to whether Amos or Rodriguez has ever reported any driver to Kelvin or has ever made any recommendation regarding their discipline. The Board has long held that where the Employer conducts an independent investigation regarding an individual’s recommendation for discipline of another employee, such recommendation is insufficient to establish supervisory authority.[40] In the present case, because of Rivera’s contradictory testimony, it is unclear whether such an investigation is made following a

recommendation to discipline by Amos or Rodriguez.

Although the record shows that Amos and Rodriguez have not executed the ICA, there is no evidence regarding their compensation, as compared to the drivers or to the warehouse employees. However, Amos and Rodriguez receive the same fringe benefits as the warehouse employees, whereas the drivers do not receive any fringe benefits from the Employer. There is little or no other evidence regarding the extent to which Amos or Rodriguez share a community of interest with the drivers or warehouse employees.

In these circumstances, I find that there is insufficient evidence to make a finding as to the supervisory status of Amos or Rodriguez or to determine whether they otherwise share a community of interest with the warehouse employees and drivers so as to require their inclusion in the unit. Therefore, I shall permit them to vote subject to challenge in the directed election herein.

CONCLUSIONS AND FINDINGS

A. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

B. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate

[41]

the purposes of the Act to assert jurisdiction in this case.

C. The Petitioner claims to represent certain employees of the Employer.

D. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1), and Section 2(6) and 2(7) of the Act.

D. The following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers and warehouse employees employed by the Employer at its Tallahassee facility, excluding all office clerical employees, guards and

[42]

supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters Local Union No. 991, affiliated with International Brotherhood of Teamsters, AFL-CIO. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who are employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that began less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers, but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior

Underwear, Inc. 156 N.L.R.B. 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision , the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all eligible voters. North Macon Health Care Facility, 315 N.L.R.B. 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 201 East Kennedy Blvd., Suite 530, Tampa, FL 33602, on or before **May 9, 2005**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. Since the list will be made available to all parties to the election, please furnish a total of **two** copies. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the Election Notice. Club Demonstration Services, 317 N.L.R.B. 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request

for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W. Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST on **May 16, 2005**. The request

[43]

may not be filed by facsimile.

Dated at Tampa, Florida, this 2nd day of May, 2005.

/s/[Rochelle Kentov]
Rochelle Kentov, Regional Director
National Labor Relations Board, Region 12
201 E. Kennedy Boulevard, Suite 530
Tampa, Florida 33602

---

[1]
The Employer's name appears as amended at the hearing.

[2]
Upon the Petitioner's request for an extension of time, the date set for the timely filing of briefs was Monday, April 11, 2005. The Employer did not timely deliver its brief to the Regional office on that date. Rather, NICA, Inc., on behalf of the Employer, faxed and electronically mailed its brief to the Regional office, which are not permissible forms of service on the Regional office, on that date. See Section 102.114(g) of the Board's Rules and Regulations, which prohibits the filing of briefs by facsimile. See also the document titled "Communications with Regional, Subregional and Resident Offices and Board Agents By E-mail", which was served on the parties with the petition, which states that outside parties may not electronically transmit representation case briefs to the Regional Director; that document also is an attachment to OM Memo 04-43, issued March 30, 2004; and OM Memo 05-59, issued April 28, 2005. OM Memos can be found under "E-Gov" on the Board's web site: www.nlrb.gov.

[3]
At the hearing, the parties stipulated to the appropriateness of the unit, contingent upon a finding that the drivers are employees within the meaning of Section 2(3) of the Act.

[4]
The record does not show the names and titles of any corporate officers.

[5]
The record evidence does not provide the exact date.

[6]
Joint Exhibit 1, dated October 25, 2004.

[7]
Rivera did not provide specific examples of how they accomplish these responsibilities.

[8]

Although Amos and Rodriguez perform the same delivery services as do the drivers, they have never signed the ICA.

[9]

Since the warehouse operates about 15 hours a day, it appears that Amos and Rodriguez would have to substitute for Kelvin on a regular basis.

[10]

In the record, the warehouse employees are also referred to as dockworkers.

[11]

According to Rivera, the Employer "put that time so everybody can get there and be there on time". He testified that, on occasion, a driver will not report to work "on time" but he is still expected to make all deliveries on his route.

[12]

Throughout his testimony, Rivera referred to the drivers previously employed by the Employer who then signed the ICA. Although he testified that the Employer would no longer hire "employees" to provide delivery and pickup services, it is unclear how many "new" drivers have signed the ICA at the Tallahassee facility..

[13]

Although J.D. performs the same delivery services as do the drivers, he has never signed the ICA.

[14]

Joint Exhibit 1 ("Services Covered", 1c and e).

[15]

The record does not contain a copy of this "guide" so it is not known whether this is a reference to DHL's services guide or if it is some kind of delivery manifest.

[16]

In its brief, the Employer concedes that Amos and Rodriguez have the authority to independently "adjust" drivers' loads.

[17]

As will be discussed below, drivers are paid by the airbill or package tracking number; therefore, the number of packages delivered by the driver directly affects his compensation.

[18]

The driver must use the vehicle insurer designated by the Employer, as will be discussed below.

[19]

Of course, the driver is not compensated for any package that he fails to pick up or deliver.

[20]

These figures are taken from Joint Exhibit 1. The ICA provides that an "airbill" is any piece or pieces moving under a single airbill or, in the absence of an airbill, a unique tracking number.

[21]

In its brief, the Employer argues that there is no "mechanism" which guarantees a certain level of income for the drivers; however, as noted, the ICA's formula for compensation appears to identify a fixed base airbill level per week and a fixed base rate per airbill.

[22]

The Employer's assertion, in its brief, that the drivers are not required to wear DHL's uniform is clearly controverted by the testimony of the Employer's witness.

[23]

The ICA specifies the make, model, color, year, vehicle identification number, and vehicle license number of the vehicle to be driven by the individual driver.

[24]

Although Rivera testified that the drivers must provide their own maps, it would seem unlikely that they would need any maps since they have been driving the same route for years. The ICA also refers to other equipment expenses but there is no record evidence that the drivers use any such equipment.

[25]

However, the driver cannot give his DHL freight to a competitive delivery service for its delivery.

[26]

It seems highly unlikely that DHL would permit the driver who wears a DHL uniform and drives a van clearly identified as a DHL van to make deliveries for competitors or other delivery services when wearing the DHL uniform or driving the DHL van. Indeed, Rivera testified that he believed that the drivers were not permitted to do so because DHL's "trademark" is on the van. In this regard, there is a reference in the ICA to the driver's obligation to abide by the DHL trademark standards. Of course, the driver does not need permission from the Employer to take a part-time job, which does not require the use of his van, as any other employee might do.

[27]

See Roadway Package System, 326 NLRB 842, 850 (1998) and Dial-A-Mattress Operating Corp., 326 NLRB 884, 891 (1998), the lead cases related to the status of drivers as employees or independent contractors. The common law agency test examines the following factors: (1) the control that the employing entity exercises over the details of the work; (2) whether the individual is engaged in a distinct occupation or work; (3) the kind of occupation including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without superivsion; (4) the skill required in the particular occupation; (5) whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time the individual is employed; (7) the method of payment, whether by the time or by the job; (8) whether the work in question is part of the employer's regular business; (9) whether the parties believe that are creating an employment relationship; and (10) whether the principal is in the business.

[28]

BKN, Inc., 333 NLRB 143, 144 (2001).

[29]

Roadway Package System, 326 NLRB at 851.

[30]

Dial-A-Mattress, 326 NLRB at 891-892.

[31]

332 NLRB 1522 (2000).

[32]

343 NLRB No. 108, slip op. 4-6 (December 16, 2004).

[33]

In effect, the drivers were confronted with the choice of losing their full-time job or signing the ICA.

[34]

Argix, 343 NLRB at slip op. p. 6.

[35]

California Beverage Co., 283 NLRB 328 (1987).

[36]

Arlington Masonry Supply, 339 NLRB 817 (2003).

[37]

NLRB v. Kentucky River Community Care, 532 U.S. 706, 712 (2001); Harborside Health Care Inc., 330 NLRB 1334 (2000).

[38]

Michigan Masonic Home, 332 NLRB 1409 (2000).

[39]

Western Union Telegraph Co., 242 NLRB 825, 826 (1979).

[40]

See Greyhound Airport Services, 189 NLRB 291, 293-294 (1971).

[41]

The Employer is a Georgia corporation engaged in the business of parcel pickup and delivery services. During the past 12 months, the Employer, in the course and conduct of its operations as described above, purchased and received at its Florida facility, goods and materials valued in excess of $50,000 directly from points located outside the State of Florida.

[42]

As noted above, Tony Amos and Ron Rodriguez shall be permitted to vote subject to challenge in the directed election herein.

[43]

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board's office in Washington, D.C. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.